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March 14, 2003

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171; *Telecommunications Services for Individuals with Hearing Speech Disabilities and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571; *Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size*, CC Docket No. 92-237, NSD File No. L-00-72; *Number Resource Optimization, CC Docket No. 99-200; Telephone Number Portability*, CC Docket No. 95-116; and *Truth-in-Billing and Billing Format*, CC Docket No. 98-170.

Dear Ms. Dortch:

AT&T Corp. ("AT&T") submits this letter to describe why it would be arbitrary and capricious for the Commission to grant ILEC requests for relief from Rule 54.712's limitations on universal service contribution line-item recovery,[1] but to deny or fail to consider AT&T's requests for similar relief. AT&T has filed both an unopposed petition for limited waiver of Rule 54.712, as well as a petition for reconsideration and clarification.[2]

[1] *See* 47 C.F.R. § 54.712.

[2] AT&T Petition for Expedited Reconsideration & Clarification in CC Dockets Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, & 98-170 (filed Jan.29, 2003) ("AT&T Petition for Reconsideration"); AT&T Petition for Interim, Limited Waiver in CC Dockets Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, & 98-170 (filed Feb. 12, 2003) ("AT&T Waiver Petition").

Rule 54.712 provides that "If a telecommunications carrier chooses to recover its federal universal service contribution costs through a line-item on a customer's bill, as of April 1, 2003, the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion *of that customer's bill* times the relevant contribution factor."[3] In paragraph 51 of the *Interim USF Contribution Order*, the Commission made its prohibition clear: "In addition, we no longer will permit carriers—whether wireline or wireless—to average contribution costs across all end-user customers when establishing federal universal service line item amounts."[4]

Since issuing the *Interim USF Contribution Order*, the Commission has received three sets of requests for relief from Rule 54.712, each of which focuses on this prohibition against averaging:

- Commercial Mobile Radio Service ("CMRS"): CMRS carriers argued that, although they had developed the means to estimate the percentage of interstate usage on their networks in aggregate, they could not track that usage at a customer level. Accordingly, CMRS carriers argued that they could not implement a recovery limitation based strictly on the interstate usage on a customer's bill without making costly changes to their billing systems.[5] CMRS carriers therefore requested that the Commission "clarify" that Rule 54.712 did not prohibit them from averaging recovery by applying a uniform percentage to each bill to allocate revenue to interstate telecommunications, even though this did not correspond to an individual customer's actual interstate usage. The Commission granted this relief to CMRS carriers.[6]

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[3] 47 C.F.R. §54.712(a) (emphasis added).

[4] *In re Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format*, Report & Order & Second Further Notice of Proposed Rulemaking, FCC No. 02-329 (rel. Dec. 13, 2002) ("*Interim USF Order*"), at ¶ 51.

[5] *See* Letter from Michael Altschul, CTIA, to Marlene H. Dortch, Federal Communications Commission, in CC Dockets Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, & 98-170 (filed Jan. 16, 2003), at 1.

[6] *In re Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone*

- Incumbent Local Exchange Carriers ("ILECs"): ILECs argue that it is:

    - Difficult and costly to adapt their billing systems to apply the FCC contribution factor to primary interexchange carrier ("PIC") change charges, presubscribed interexchange carrier charges ("PICC") and local number portability ("LNP") charges billed to end users to arrive at the recovery charge, such that it would be more prudent during an interim contribution mechanism to allow ILECs to average these amounts across all customers;[7]

    - Impossible to recover universal service contributions for interstate charges (such as PIC change and LNP charges) from Lifeline customers, who may not be billed a USF contribution line-item pursuant to Rule 54.712(b), such that the Commission should permit averaging of recovery of these amounts across all non-Lifeline residential customers;[8] and

    - Not competitively neutral to require them to charge Centrex customers a USF recovery fee based on their interstate telecommunications charges because Centrex and PBX lines are charged the same SLC, such that the Commission should permit the ILECs to charge only $1/9^{th}$ of a recovery fee to its Centrex customers and average the recovery of the remainder across all multiline business customers (with the equivalency ratio presumably applying to this averaged recovery as well).[9]

  ILECs therefore argue that they should be permitted to average USF contribution recovery within broad classes of customer groups, and, in the process, apply an equivalency discount to Centrex lines (which would result in transferring recovery of USF contribution to non-Centrex customers).

- AT&T: AT&T has demonstrated that it cannot recover a USF line-item recovery charge from customers for whom the billing ILEC refuses to allow AT&T to add a USF recovery line-item to the bill, or will only do so at wholly unreasonable rates (thereby *de facto* refusing to add such a line-item). AT&T refers to these charges as "unbillables." It is also difficult and costly to implement other possible means of

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Number Portability; Truth-in-Billing and Billing Format, Order & Order on Reconsideration, FCC No. 03-20 (rel. Jan. 30, 2003) ("*Wireless Clarification Order*"), at ¶ 8.

[7] *See* Petition for Interim Waiver of Verizon Telephone Companies, SBC Communications Inc., & BellSouth Corp., in CC Dockets Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, & 98-170 (filed Feb. 6, 2003) ("ILEC Waiver Petition"), at 6.

[8] *See id.* at 6 n.7; Reply Comments of SBC Communications, Inc., in CC Dockets Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, & 98-170 (filed Mar. 10, 2003) ("SBC Reply Comments"), at 3-4.

[9] *See* ILEC Waiver Petition at 5; Petition of the United States Telecom Ass'n for Partial Reconsideration & Clarification in CC Dockets Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, & 98-170 (filed Jan. 29, 2003) ("USTA Petition for Reconsideration"), at 9-12; SBC Reply Comments at 3.

recovering these unbillables, including adding other line-items (which would also face unbillable problems).[10]

The problems identified by CMRS carriers, ILECs and AT&T are all substantially similar, and both the ILECs and AT&T have filed petitions for waiver with the Commission as well as petitions for reconsideration.[11] For similar reasons that arise from the regulatory history of each sector, a recovery line-item limited to the end user's interstate telecommunications revenue times the contribution factor will lead systematically to underrecovery of universal service contributions or other administrative difficulties. Moreover, implementing the billing system modifications to reflect the FCC's prescribed formula is costly, especially for an interim contribution mechanism that will likely be replaced because it is discriminatory and unsustainable. Like AT&T, ILECs cannot assess universal service recovery fees according to the Commission's prescribed formula against all their customers, because Lifeline customers are excluded. Like AT&T, wireless carriers and ILECs could implement systems to charge USF fees according to the Commission's prescribed formula, but doing so would be enormously costly and burdensome. ILECs argue they face competitive inequity issues as compared with providers of PBX service; the same is true, however, for wireline long distance providers that are required to charge recovery fees based on actual end user interstate revenues, but that must compete with wireless carriers that are now permitted to charge recovery fees based on average customer percentage interstate revenues.[12]

Unfortunately, the Commission has begun to deal with these substantially similar requests for relief from Rule 54.712 on a selective, ad hoc basis. To date, the Commission has granted only the relief sought by the CMRS carriers. If the Commission continues to act on a selective, ad hoc basis—such as by granting the ILECs' requested relief but not AT&T's—rather than treating all substantially similar requests in a like manner, it will be acting arbitrarily and capriciously.

The law will not permit the Commission to favor only CMRS carriers (or CMRS carriers and ILECs) with selective relief from the billing and implementation problems that all carriers face as a result of the adoption of new Rule 54.712. To the contrary, it is a fundamental principle of administrative law that an agency may not "treat like cases differently."[13] That is, it cannot "grant to one [entity] the right to do that which it denies to another similarly situated."[14] The courts have frequently applied this basic requirement of reasoned decisionmaking to ensure that the Commission's rules are "applied without unreasonable discrimination" and that the agency

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[10] *See* AT&T Petition for Reconsideration at 3.

[11] *See* AT&T Waiver Petition; ILEC Waiver Petition.

[12] *See* AT&T Petition for Reconsideration of the Wireless Clarification Order (filed March 13, 2003).

[13] *Freeman Eng'g Assoc. v. FCC*, 103 F.3d 169, 178 (D.C. Cir. 1997) (quoting *Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985)).

[14] *United States v. Diapulse Corp. of America*, 748 F.2d 56, 62 (2d Cir. 1984) (quoting *Marco Sales Co. v. FTC*, 453 F.2d 1, 7 (2d Cir. 1971)); *see also Ger-Ro-Mar, Inc. v. FTC*, 518 F.2d 33, 35 (2d Cir. 1975) (the government may not give "its blessings to [petitioner's] competitors while condemning [petitioner]").

"articulates with reasonable clarity its reasons for decision."[15] An FCC decision—like a decision of any agency—is arbitrary and capricious if it "treat[s] similar situations in dissimilar ways."[16]

Ad hoc, segment-specific relief also cannot be justified or harmonized with the purpose of adopting Rule 54.712. Although the Commission alluded to allegations that carriers have included non-USF costs in USF-recovery line-items, it made no finding to that effect. Nor did the Commission find that any carrier or industry segment was violating the existing "truth-in-billing" rules, which require all carriers to render bills that are non-misleading.[17] In fact, other than prohibiting recovery of administrative costs through a USF recovery line-item—which is not implicated by the types of requested relief discussed above—the only stated purpose of the USF line-item recovery charge was to eliminate customer confusion regarding the universal service line-item.[18] But selective, segment-specific ad hoc relief from Rule 54.712 does nothing to alleviate consumer confusion. Wireless charges as a percentage of the customer's actual interstate usage will already be different than wireline charges under the relief already granted to the wireless industry. If the Commission grants the ILECs relief, Centrex customers will see a different charge, which will be a different percentage of that customer's interstate bill, than other multiline business customers, and all end users will be receiving a USF recovery charge that is higher than the uniform percentage surcharge that the FCC intended for Rule 54.712 to create.

There is no coherent way to explain these differences to consumers, because there is no principled basis underlying the differences among the charges. Indeed, if the Commission continues to act selectively, it will create more confusion than if were simply to grant all petitions and allow all carriers to average universal service recovery charges among those customers whom they can bill, which would be a concise, articulable principle. Therefore, the Commission should ensure that it treats these similarly situated carriers in such a nondiscriminatory and equitable manner.

Courts have previously cautioned the FCC against creating mechanisms that are designed to protect favored industry segments without a clearly justified, principled basis. Indeed, the D.C. Circuit was once led to comment, "'Oh what a tangled web we weave, when first we practise' – dare we say, 'to relieve'?"[19] Moreover, particularly with respect to universal service, the Commission has been reversed when it could not explain how a series of ad hoc actions, the

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[15] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

[16] *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975); *see also Melody Music Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965).

[17] *See* 47 C.F.R. § 64.2401(b).

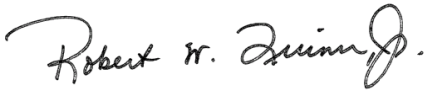
[18] *See Interim USF Contribution Order* at ¶ 50. AT&T continues to believe that recovery of administrative costs should be permitted for all carriers, not just price-cap LECs as SBC and USTA have suggested in their petitions for reconsideration. *See* AT&T Comments on Petitions for Reconsideration & Clarification in CC Dockets Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, & 98-170 (filed Feb. 27, 2003), at 2, 5-7.

[19] *Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522, 533 (D.C. Cir. 1996).

components of which also had to be individually justified, added up to a coherent and principled whole.[20]

AT&T is entitled to a "hard look" at its waiver request.[21] To be meaningful, that "hard look" must occur quickly. The *Interim USF Order* is scheduled to take effect in a mere 18 days, meaning that failure to consider and act on AT&T's waiver request in the next several days would be tantamount to denying AT&T's waiver request with "no look", in contravention of long-settled administrative law.[22] Accordingly, the FCC should not grant additional relief from Rule 54.712 on a selective, ad hoc basis, but rather grant further relief only on an overall, nondiscriminatory and principled basis.

Sincerely,



cc: Matthew Brill
Jordan Goldstein
Daniel Gonzalez
Christopher Libertelli
Lisa Zaina
William Maher
Carol Mattey
Vickie Byrd
Eric Einhorn
Paul Garnett
Diane Law-Hsu

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[20] *See, e.g., Qwest v. FCC*, 258 F.3d 1191, 1205 (10th Cir. 2001) (directing the FCC to "explain further its complete plan for supporting universal service").

[21] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("[A]llegations … stated with clarity and accompanied by supporting data, are not subject to perfunctory treatment, but must be given a 'hard look.'").

[22] *See id.* at 1159 (holding that an agency "may not act out of unbridled discretion or whim in granting waivers any more than in any other aspect of its regulatory function").